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Supreme Court of the United States

October Term, 1975

No.

INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, AFL-CIO LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC., AND DORTHA GUY,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioner International Union of Electrical, Radio and Machine Workers ("IUE"), AFL-CIO, Local 790 prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on October 24, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 525 F.2d 124, is attached to this petition as Appendix A (1a-12a). The Order of the Court of Appeals denying rehearing, en-

tered on December 9, 1975, is attached to the petition as Appendix B (13a). The opinions of the District Court, reported at 8 FEP Cases 309, 311 and 313, are attached to this petition as Appendix C (14a-29a).

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1975. A timely petition for rehearing was denied on December 9, 1975, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a union member may be denied access to the administrative and judicial remedies for employment discrimination provided by Title VII of the Civil Rights Act of 1964 for failure to file a charge with the Equal Employment Opportunity Commission within the time limit set by 42 U.S.C. 2000e-5, if such a charge was filed within the requisite time period as calculated from the final denial of a grievance properly pursued under a collective bargaining agreement in force?

2. Whether the 1972 Amendments to Title VII, extending from 90 to 180 days the time for filing a charge with the EEOC, rendered timely any charge before the EEOC on the effective date of the Amendments and alleging discriminatory acts less than 180 days before that date?

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are attached hereto as Appendix D (30a-31a):

(1) Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 259 (July 2, 1964).

(2) Section 706(e) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 104 (March 24, 1972) (42 U.S.C. § 2000e-5(e)).

(3) Section 14 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 113 (March 24, 1972).

STATEMENT OF THE CASE

Dortha Guy is a black female who was employed by respondent Robbins & Myers, Inc. ("the Company") in January 1968. Soon after her employment she joined the petitioner, Local 790 of the International Union of Electrical, Radio, and Machine Workers ("the Union"), the exclusive bargaining representative of employees in her unit. At the time of the events which precipitated this lawsuit, Ms. Guy was a union steward. In her capacity as steward, she filed many grievances under the collective bargaining agreement on behalf of her fellow employees.¹ And, during her employment with the Company, she filed on her own behalf at least six grievances, some of which were adjusted in her favor.

On October 25, 1971, the Company discharged Ms. Guy.

¹ The collective bargaining agreement in force provided a three-step grievance procedure for "[a]ll differences, disputes and grievances that may arise after the signing of this Agreement between the Union, any employee or group of employees, and the company concerning the application or interpretation of this agreement." [Article XVIII—Grievance Procedure]. A fourth step, arbitration, was provided for certain kinds of disputes.

A grievance protesting the "unfair action" of the Company in discharging Ms. Guy was filed on October 27, 1971. Thereafter, the Union processed the grievance through the first three steps of the grievance procedure. The Company denied the grievance at the third step on November 18, 1971, and it was not pursued further.

On February 10, 1972—108 days after her discharge, but less than 90 days after the completion of the grievance procedure—Ms. Guy filed charges of racial discrimination relating to her discharge with the Equal Employment Opportunity Commission ("EEOC") against both the Company and the Union. The EEOC determined that "the timeliness and all other jurisdictional requirements have been met" (Determination, Case No. YME4-155), investigated the charge, and issued a "right to sue" letter on November 20, 1973. Ms. Guy then instituted this lawsuit under 42 U.S.C. § 2000e-5.

The Company moved to dismiss on the ground that Ms. Guy's EEOC charge had not been filed within 90 days of her discharge. The district court granted the motion. Noting that Ms. Guy's charge was filed 108 days after her discharge, and that at the time of the discharge the time limit for filing EEOC charges was 90 days, the court held that it was without jurisdiction to adjudicate her Title VII claim (24a). While recognizing that several courts of appeals had held that the time for filing an EEOC charge is tolled during the pendency of a formal grievance pursued in accord with a collective bargaining agreement, and that Ms. Guy's charge had been filed less than 90 days after completion of the grievance procedure, the district court viewed *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, as

precluding such tolling (22a-24a). The district court noted that Title VII was amended effective March 24, 1972 to extend the time for filing EEOC charges to 180 days from the date of the alleged discriminatory act, an extension which if applicable would have rendered Ms. Guy's charge timely without the need for tolling, but regarded that amendment as inapplicable to this case² (20a). See note 3, *infra*.

Following the district court's dismissal of the suit against the Company, the Union moved to be realigned as a party plaintiff for purposes of appeal, noting that the Union had negotiated the grievance procedure on behalf of its members and "is interested to see that its members' rights to their contractual grievance procedure is maintained and protected." This motion was granted, and the Union and Ms. Guy each appealed.

On October 24, 1975 the court of appeals affirmed the dismissal of the suit against the Company. On the tolling question, it reasoned that since Title VII "creates a right and liability which did not exist at common law and prescribes the remedy[,] [t]he remedy is an integral part of the right and its requirements must be strictly followed," citing *The Harrisburg*, 119 U.S. 199, 214 (4a-5a). Thus, the court held that it was powerless to toll the statutory period even if tolling would effectuate Title VII's underlying policies. The court also thought that *Alexander, supra*, and *Johnson v. REA, Inc.*, 421 U.S. 454, with their emphasis upon the independence of Title VII from other legal routes to relief

² Ms. Guy's discharge occurred 150 days prior to the effective date of the 1972 amendment. On the effective date, her charge was before the EEOC.

from employment discrimination, counseled against tolling Title VII time limitations to permit the effective pursuit of grievance procedures (4a).

The court of appeals also addressed the question of the effect of the 1972 amendments, a question raised in that court by the EEOC appearing as amicus curiae.³ The court held the 1972 amendments extending the time to file EEOC charges to 180 days, effective March 24, 1972, cannot apply to this case, since "Guy's claim was barred on January 24, 1972" and "[t]he subsequent increase of time . . . could not revive plaintiff's claim." (8a-9a). Judge Edwards, dissenting on this point, noted that the Ninth Circuit, in *Davis v. Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975), had recently held that "the extended limitations period [applies] to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period." (522 F.2d, at 830; 10a). Judge Edwards would have remanded to the district court to consider the *Davis* rationale and its applicability to the present case (12a).

REASON FOR GRANTING THE WRIT

INTRODUCTION AND SUMMARY

The first holding below—that the pendency of a grievance does not toll the time limit for filing an EEOC charge—is

³ The court of appeals believed it was not compelled to address this argument since it had not been raised below (8a). Nonetheless, it did reach the issue and decide it. Although the effect of the 1972 amendment was not expressly discussed by the parties in the district court, that court was aware of the amendment but decided it was inapplicable to this case. See p. 5, *supra*.

in direct conflict with the decisions of every other court of appeals which has considered the question—the Fifth Circuit, the Seventh Circuit, the Ninth Circuit, and the Tenth Circuit. Moreover, that holding is inconsistent with principles enunciated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, for it would hamper the effectiveness of grievance-arbitration procedures and could discourage employees from pursuing such procedures to finality before filing charges with the EEOC. *Alexander* recognized the importance of grievance-arbitration procedures as a method of resolving employment disputes which might otherwise become the subject of Title VII complaints, and explained that Title VII must be construed so as not to compromise the functioning of such procedures or discourage resort to them. See also *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50.

The second holding of the court below, that the 1972 amendment enlarging the time for filing charges with the EEOC does not apply to charges concerning acts which occurred more than 90 but less than 180 days before March 24, 1972, is directly contrary to the decision of the Ninth Circuit in *Davis v. Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975).

Both issues are of great importance to the enforcement of Title VII. Indeed, the resolution of the tolling issue could have a vital impact upon the viability of the grievance-arbitration procedures as an effective forum for the resolution of employment discrimination claims. In view of the direct conflict among the Circuits on both issues, and the infidelity of the decision below to principles enunciated by this Court, certiorari should be granted.

I.

THE HOLDING OF THE COURT OF APPEALS THAT RESORT TO COLLECTIVELY BARGAINED GRIEVANCE PROCEDURES DOES NOT TOLL THE TIME PERIOD FOR FILING CHARGES WITH THE EEOC IS CONTRARY TO THAT OF EVERY COURT OF APPEALS WHICH HAS CONSIDERED THE ISSUE AND INCONSISTENT WITH PRINCIPLES ENUNCIATED RECENTLY BY THIS COURT.

1. Every other court of appeals which has considered whether resort to a collectively bargained grievance procedure tolls the time limit for filing a related employment discrimination charge with the EEOC has concluded that it does. *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Malone v. North American Rockwell*, 457 F.2d 779 (9th Cir. 1972); *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1974), *Sanchez v. T.W.A.*, 499 F.2d 1107 (10th Cir. 1974).⁴ This result has been seen as effectuating Title VII's preference for private resolution of employment discrimination claims. As the Fifth Circuit explained in *Culpepper*:

"This court has held many times that Title VII should receive a liberal construction while at all times bearing in mind that the central theme of Title VII is 'private settlement' as an effective end to employment discrimination. In *Oatis v. Crown Zellerbach* (5 Cir., 1968), 398 F.2d 496, this court held that:

'It is thus clear that there is *great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation.*'

⁴ Indeed, the Sixth Circuit itself seems to have adhered to this rule in the past. *Schiff v. Mead Corp.*, 2 FEP Cases 1089 (6th Cir. 1970).

This view was again voiced in *Jenkins v. United Gas Corporation* (5 Cir., 1969) 400 F.2d 28, where this court stated that:

'* * * EEOC whose function is to effectuate the Act's policy of voluntary conference, persuasion and conciliation as the principal tools of enforcement.'

It would, therefore, be an improper reading of the purpose of Title VII if we were to construe the statute as did the district court to permit the short statute of limitations to penalize a common employee, who, at no time resting on his rights, attempts first in good faith to reach a private settlement without litigation in the elimination of what he believes to be an unfair, as well as an unlawful, practice." (421 F.2d, at 891.)

The court below believed that the force of this analysis has been undermined by this Court's decision in *Alexander*, *supra*, holding that arbitration decisions are neither binding nor necessarily entitled to deference in Title VII cases. But the Sixth Circuit is the only court of appeals to perceive any inconsistency between the *Alexander* decision and a ruling tolling the time for filing a Title VII charge while grievance-arbitration proceedings are pursued.⁵

2. Indeed, it is the decision below which is unfaithful to the principles enunciated in *Alexander*. This Court in *Alex-*

⁵ Subsequent to *Alexander*, the Tenth Circuit squarely held that the time for filing EEOC charges is tolled by pursuit of a grievance. *Sanchez v. TWA*, 499 F.2d 1107 (10th Cir. (1974)). See also *Burdzell v. Cities Service Co.*, 8 FEP Cases 467 (W.D. Pa. 1974), regarding *Alexander* as supporting tolling. Prior to *Alexander* three Circuits which had correctly anticipated the holding in *Alexander* simultaneously adhered to the view that pursuit of grievance procedures tolls the time for filing EEOC charges. Compare, *Culpepper*, *supra* (5th Cir. 1970); *Moore*, *supra* (7th Cir. 1972); and

under recognized that Title VII's policy favoring voluntary compliance with employment discrimination laws was furthered by preserving arbitration as an effective remedy for employees' grievances. The Court noted that a rule requiring courts in Title VII lawsuits to defer to arbitration results:

"might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less." (415 U.S., at 59).

Consequently, the Court declared "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue *fully* both his remedy under the grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII," (*Id.*, at 59-60), and held "that an individual does not forfeit his private cause of action if he *first* pursues his grievance to final arbitration under the non-discrimination clause of a collective-bargaining agreement." (*Id.* at 49, emphasis added).

This holding was reaffirmed in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, where the Court noted that arbitration is often an efficacious remedy

Malone, supra (9th Cir. 1972) with *Hutchings v. U.S. Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973), noted in *Alexander, supra*, 414 U.S. at 45 n.5, as consistent with *Alexander*.

for employment discrimination, including charges of the "pattern and practice" variety (*id.*, at 66 & n. 18). Indeed, the IUE which, to vindicate the rights of its female and minority members, has vigorously pursued all of the alternatives open to parties claiming that there has been discrimination on the basis of race, color, sex, or national origin, has found that grievance-arbitration procedures often prove to be the most expeditious and effective way to remedy employment discrimination, although it has filed charges with the EEOC, the Labor Department and the NLRB and instituted lawsuits under Title VII, 42 U.S.C. § 1981, and the Equal Pay Act, 29 U.S.C. 206(d), when the employer has refused to correct discrimination through collective bargaining or the grievance-arbitration procedures. See *Westinghouse Electric Corp.* NLRB Case No. 6-CA-7680, JD-86-76 (Feb. 17, 1976), pp. 8-9, 11, 21-22, 24-27, describing the broad range of the IUE's equal opportunity enforcement program. Because of its belief in the grievance-arbitration mechanism as perhaps the best alternative for routing out employment discrimination efficiently and effectively, the IUE has begun exploring in collective bargaining the possibilities for novel grievance-arbitration procedures adapted precisely to employment discrimination complaints, and has drafted model contract provisions governing arbitration of employment discrimination claims. *Id.*; Hammerman & Rogoff (special assistants to the Director of Compliance of the EEOC), *The Union Role in Title VII Enforcement*, 7 Civil Rights Digest, A Quarterly of the U.S. Commission on Civil Rights, No. 3, pp. 22, 27-28; Newman, *Post-Gardner Developments in the Arbitration of Discrimination Claims*, Proceedings of the 28th Meeting,

National Academy of Annual Arbitrators, pp. 36, 57 (1975).

In *Emporium Capwell, supra*, the Court stated that "even if the arbitral decision denies the putative discriminatee's complaint his access to the processes of Title VII and thereby to the federal courts is not foreclosed. *Alexander v. Gardner-Denver Co., supra*." 420 U.S., at 66 n. 18. However, while the grievance-arbitration procedure provides the fastest method for resolving discrimination claims, the period of time from the occurrence upon which a grievance is based to an arbitration hearing or to the arbitration award can well be more than 180 days.⁶ Thus, unless the time period for filing an EEOC charge is tolled while grievance procedures go forward, the efficacy of the grievance-arbitration remedy for employment discrimination-related claims, and the possibility of improving those procedures with regard to such claims, will be severely compromised, and employees may well be "foreclosed" from Title VII processes and the courts after an adverse arbitration decision.

"The grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government [,] * * * the means of * * * molding a system of private law." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581.⁷ If an employee, in order to preserve

⁶ Federal Mediation and Conciliation Service, *Twenty-Seventh Annual Report, Fiscal Year 1974*, at 48; Davis & Pati, *Elapsed Time Patterns in Labor Grievance Arbitration: 1942-1972*, 29 Arb. J. 15, 21 (1974).

⁷ The courts which have recognized a rule tolling the time for filing a Title VII charge during the pendency of a grievance proceeding have uniformly, and in our view correctly, applied the rule only when a formal, pre-determined set of procedures acceded to

his Title VII action, were compelled to file a complaint with a government agency while the grievance-arbitration procedure was in process, the motivation for amicable, private settlement would then disappear, and the parties would instead look toward protecting their positions should litigation ensue. The likelihood of a conclusion to the grievance procedures satisfactory to all concerned would then greatly diminish.

Further, employees faced with the prospect that the deadline on their EEOC charge could run out while the grievance-arbitration procedure was in process, as the sources cited above, n. 6 *supra*, show is quite possible, could well choose to forego their contractual remedy for fear of losing their Title VII rights. The result in either case will be "more litigation, not less," *Alexander, supra*, and a burdening of the already over-taxed EEOC and federal courts with disputes which might be settled in the grievance-arbitration forum unions have negotiated for their members.

On the other hand, many union members will determine to pursue at first only the grievance procedure, with which they are familiar and which may have worked for them in the past. See p. 3, *supra*. These employees could, under the holding below, be precluded from any Title VII remedy should the grievance-arbitration procedure fail to produce satisfactory results, since such procedures can well, as noted above, run beyond the time limit for filing Title VII

in advance by the employer was invoked, and not when plaintiff claimed they had made ad-hoc attempts, outside of any agreed-upon procedure, to discuss or to settle the claim. See, e.g., *Moore v. Sunbeam Corp., supra*, 459 F.2d, at 827; *Dudley v. Textron, Inc.*, 386 F.Supp. 602 (E. D. Pa. 1975).

charges if pursued to their conclusion. Such a result would be in direct conflict with *Alexander*, which stresses that Congress intended to allow employees to pursue both contractual and Title VII remedies.⁸

3. The court below also misconstrued *Johnson v. REA, Inc.*, 421 U.S. 454, as casting doubt upon the grievance-tolling rule adopted by all other circuits. *Johnson* held that the time for filing a suit under the Civil Rights Act of 1866 (42 U.S.C. § 1981)—a time period determined by reference to analogous state statutes of limitation—is not tolled by the filing of a charge with the EEOC. The issue in this case, however, is not (as it was in *Johnson*) whether one statutory route for judicial relief regarding employment discrimination is to be adjusted by tolling to accommodate an entirely separate Congressional scheme for providing such relief. Rather, the question is whether the policies underlying Title VII itself, which, as *Alexander* recognized, prefer voluntary settlement without litigation, dictate tolling Title VII time limits to preserve the grievance-arbitration forum as an effective means to voluntary settlement.

The court of appeals believed that it was powerless to accommodate Title VII's underlying policies by tolling time limits contained in that statute. It relied upon the proposition that if a federal statute creating a new right contains time limitations upon the assertion of that right, a court may not create exceptions to that limitations period as

⁸ The court below pointed to a passage in *Alexander* requiring "timely" filing of an EEOC charge as necessitating its decision (5a.). Obviously, the *Alexander* court did not purport to determine what constitutes "timely" filing, and under our approach a charge would have to be "timely" as calculated from the conclusion of grievance-arbitration proceedings.

it may do with an ordinary statute of limitations, citing *The Harrisburg*, 119 U.S. 199, and *Johnson, supra*. But this Court, in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, noting the precise passage from *The Harrisburg* on which the court of appeals relied, held that "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." (*Id.*, at 730.)⁹ And, in *Johnson* the Court explicitly noted a distinction between the situation before it and one, as here, in which the limitations period was "derived directly from federal statutes rather than by reference to state law," 421 U.S., at 466, and suggested that in the latter situation a more flexible approach to the limitations period is warranted. *Id.*

Indeed, *Johnson* explicitly recognized that statutes of limitation can be tolled if to do otherwise "would be inconsistent with the federal policy underlying the cause of action under consideration." *Id.*, at 465 (emphasis supplied).¹⁰ It held only that the policy presuppositions underlying 42 U.S.C. § 1981 did not dictate tolling for pursuit of

⁹ *American Pipe* limited the holding of *The Harrisburg* to the situation in which both the right and the statute of limitations sought to be relied upon in federal court were state-created. (*Id.*, at 729; see also *Burnett v. New York Central R. R. Co.*, 380 U.S. 424).

¹⁰ Consistently with *American Pipe, supra*, and *Johnson*, the courts of appeal have generally held that exceptions to the literal time limits for filing EEOC charges may be allowed where appropriate to vindicate the fundamental policies of Title VII. *Reeb v.*

administrative remedies. Since, as *Alexander* demonstrates, discouraging or rendering ineffective the pursuit of grievance-arbitration procedures would frustrate the scheme of Title VII, to reject tolling in the present situation would be inconsistent with, rather than an effectuation of, the *Johnson* rationale.¹¹

4. In sum, the holding of the court below, that pursuit of a grievance does not toll Title VII's time limit for filing EEOC charges, conflicts with the decisions of all other Circuits which have ruled on the question, is unfaithful to the policies of Title VII as elucidated by this Court in *Alexander*, and is premised upon a misunderstanding of the decision of this Court in *Johnson*. Since the result reached could undermine the effectiveness of grievance-arbitration procedures in many situations, and in others could preclude resort to the courts under Title VII, it is of great day-to-day importance in American industrial life, and this Court should grant certiorari to resolve the conflict.

Economic Opportunity Atlanta, Inc., 516 F.2d 927 (5th Cir. 1975); *Vigil v. American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Anderson v. Methodist Evangelical Hospital*, 464 F.2d 723 (6th Cir. 1972); *Richard v. McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972). See also *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975). Cf. *Love v. Pullman*, 404 U.S. 522.

¹¹ At least one district court has held that this Court's decision in *Johnson* is inapposite to the instant situation and has continued to apply a tolling rule for Title VII charges for the period of pendency of grievance proceedings. *Bush v. Wood Bros. Transfer, Inc.*, 11 FEP Cases 113 (S.D. Tex. 1975). *Contra, Roberts v. Lockheed*, 11 FEP Cases 1440 (C.D. Calif. 1975). The Fifth Circuit has continued to rely upon the *Culpepper* rule since this Court's *Johnson* decision. *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 927 (5th Cir. 1975).

II.

THE DECISION OF THE COURT OF APPEALS THAT THE 1972 AMENDMENT EXTENDING THE TIME FOR FILING TITLE VII CHARGES APPLIES ONLY TO OCCURRENCES LESS THAN 90 DAYS BEFORE THE EFFECTIVE DATE OF THE AMENDMENT IS IN DIRECT CONFLICT WITH THAT OF ANOTHER COURT OF APPEALS.

Even if tolling were not allowable, Ms. Guy's charge was timely if the 1972 amendment extending the filing period from 90 to 180 days applied to alleged acts of discrimination occurring within 180 days of its effective date, since Ms. Guy's discharge occurred 150 days before the effective date of the 1972 amendment.

On this issue, the decision below—that charges barred by the 90 days time limit could not be rejuvenated by the 1972 amendment—is in square conflict with that of the Ninth Circuit in *Davis v. Valley Distributing Co.*, 422 F.2d 827 (9th Cir. 1975). While the *Davis* court noted that generally “subsequent extensions of a statutory limitations period will not revive a claim previously barred,” it abjured the wooden approach of the court below to this issue and maintained that “the question is one of legislative intent.” *Id.*, at 830. As the *Davis* court noted, § 14 of the 1972 Act explicitly provided that amendments to § 706, of which the amendment extending the time for filing charges to 180 days was one, were to be applicable to all charges “pending” before the EEOC on the effective date of the Act, March 24, 1974, and all charges “filed” thereafter. After a careful review of the legislative scheme and its history, the *Davis* court could perceive “no substantial reason for giv-

ing less than their full meaning to the words of section 14" (*id.*, at 831) and concluded that "Congress intended the extended limitations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period." *Id.*, at 830.

There is no distinction between *Davis* and this case of any conceivable relevance. In both cases the charge was first filed with the EEOC more than 90 days after the occurrence complained of and before the effective date of the 1972 amendment. In both cases, the charge would have been timely within the literal language of § 14 if first "filed" after March 24, 1972,¹² and "[t]o require a second 'filing' by the aggrieved party . . . would serve no purpose other than the creation of an additional procedural technicality." *Love v. Pullman*, 404 U.S. 522, 527. Therefore, by analogy to *Love*, the EEOC was entitled to "properly hold [the] complaint in 'suspended animation', automatically filing it upon [the effective date of the 1972 Amendments]." *Id.*, at 526. Alternatively, since the EEOC had not dismissed the charge prior to March 24, it was "pending" on that date and is within the literal language of § 14 on that basis.

¹² In *Davis*, the EEOC charge, first filed on March 14, was referred to a state agency because the complainant had failed to exhaust his state remedies and was consequently not *considered* formally filed until after March 24. Here, all procedural prerequisites to EEOC consideration were complied with before the charge was filed on February 10, and referral was unnecessary. Surely, Ms. Guy cannot be prejudiced by the fact that she had not failed, as *Davis* had, to meet Title VII's procedural prerequisites.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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APPENDIX A

Nos. 74-2144 and 74-2145

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DORTHA ALLEN GUY

and

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-
CIO LOCAL 790,

Plaintiff-Appellants,

v.

ROBBINS & MYERS, INC.

(HUNTER FAN DIVISION),

Defendant-Appellee.

APPEAL from United
States District
Court for the
Western District of
Tennessee.

Decided and Filed October 24, 1975

Before WEICK, EDWARDS and PECK, Circuit Judges

WEICK, Circuit Judge, delivered the opinion of the Court, in which PECK, Circuit Judge, joined. EDWARDS, Circuit Judge, (pp. 9a-12a) filed a separate dissenting opinion.

WEICK, Circuit Judge. Appellant Guy has appealed from an order of the District Court dismissing her complaint for wrongful discharge brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. She claimed that her employer discharged her on account of her race (Negro).

The District Court granted the defendant's motion to dismiss her Title VII claim on the ground that plaintiff had

not met the jurisdictional prerequisites of § 2000e-5(d) of the Act which were in force at the time.¹ The Act required her to file a charge with the Equal Employment Opportunity Commission (EEOC) within 90 days from the date of her discharge. She did not file the charge until after the lapse of 108 days.

The District Court dismissed her claim for violation of § 1981 of 42 U.S.C. on the ground that it was barred by the one-year Tennessee statute of limitations. Tenn. Code 28-304.

It was Guy's contention that the 90-day requirement of the Act was tolled during the pendency of a grievance which she had filed with her employer under the provisions of a collective bargaining agreement entered into between her employer and the defendant labor Union.

The sole appellate issue is whether the filing of the grievance tolled the jurisdictional requirements of the Act.

Guy's claim under 42 U.S.C. § 1981 was controlled by our decision in *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973), which was affirmed by the Supreme

¹“(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practices occurred. Except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.”

Court on May 19, 1975, 95 S.Ct. 1716 (1975). Guy has not appealed from this ruling and it has become final.

The Union originally was a party defendant but was dismissed by agreement with the plaintiff and has been realigned as a party plaintiff.

The facts pertaining to the Title VII issue were not in dispute. Guy was discharged on October 25, 1971 for failing to report for work following an authorized sick leave. A co-worker filed a grievance for her with the employer on October 27, 1971 which stated: “Protest unfair action of company for discharge. Ask that she be reinstated with compensation for lost time.” She did not explicitly claim racial discrimination. Guy processed her grievance to the third step under the collective bargaining agreement. The company rejected the grievance on November 18, 1971. Guy decided not to proceed further to arbitration. Instead she filed a charge with EEOC on February 10, 1972 which was 108 days from the date of her discharge.

The EEOC, although finding no evidence of racial discrimination, granted a right to sue letter which resulted in the filing of the present suit.

The District Judge was of the opinion that this case was controlled by the recent decision of the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

While the specific holding in *Gardner-Denver* was that the adverse decision of an arbitrator did not foreclose resort by the grievant to her federal remedy, the reasoning of the court, in our judgment, supports the proposition that the filing of a grievance under a collective bargaining agree-

ment does not toll the limitation period of an applicable federal or state statute.

The court pointed out that "in instituting an action under Title VII the employee was not seeking to review an arbitrator's decision but was asserting a right independent of the arbitration process."

The court referred to the legislative history which indicated Congressional intent that an employee could pursue any remedy which he may have under state or federal law. Thus, the employee could file proceedings under the National Labor Relations Act or with other federal, state or local agencies or pursue contractual remedies. In *Johnson v. Railway Express Agency, supra*, the court held that the various remedies are "separate, distinct and independent."

It would be utterly inconsistent with the thesis of *Gardner-Denver* and *Railway Express Agency* to hold that the pursuit of any of these remedies operates to toll other remedies which the employee has a right to resort to concurrently. See the statements of Senators Humphrey and Dirksen reported in 11 Cong. Rec. 12297 and quoted in *Banks v. Local Union, 136 Int'l Bhd. Elec. Eng'rs*, 296 F.Supp. 1188 (N.D. Ala. 1968).

In Tennessee, Civil Rights remedies are not provided by state or local law.

Subsection 5(d) of the Act contains an exception when the grievant has availed himself of remedies provided by state or local Civil Rights agencies and in such a case extends the time for filing a charge with EEOC from 90 days to 210 days after the unlawful employment practice or within 30 days after receipt of notice of termination of

state or local proceedings, whichever is earlier.

Guy would have us add another exception to the Act to toll the limitations' period of 90 days when the grievant resorts to a contractual remedy under a collective bargaining agreement.

We are not persuaded that we should add additional exceptions not authorized by Congress.

But most important is the language of Mr. Justice Powell who wrote the unanimous opinion of the court in *Gardner-Denver* at 47:

... It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. §§ 2000e-5 (b), (e) and (f).

This is a clear pronouncement that the 90-day limitation period in the Act for filing a charge with EEOC is a jurisdictional prerequisite "that an individual must satisfy before he is entitled to institute a lawsuit." Here Guy admittedly did not meet the jurisdictional prerequisite.

The limitation in Title VII is more than a mere statute of limitations. The Act creates a right and liability which did not exist at common law and prescribes the remedy. The remedy is an integral part of the right and its requirements must be strictly followed. If they are not, the right ends.

As early as 1886 the Supreme Court recognized the distinction between a statute of limitation and a limitation contained in a statute creating liability and imposing a remedy.

In *The Harrisburg*, 119 U.S. 199, 214, the court stated:

... [W]e are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. ...

In *Matheny v. Porter, Price Adm'r*, 158 F.2d 478, 479 (10th Cir. 1946), the court said:

... Ordinarily, a statute of limitation does not confer any right of action, but merely restricts the time within which the right finding its source elsewhere may be asserted. It is not a matter of substantive right. It neither creates the right nor extinguishes it. It affects only the remedy for the enforcement of the right. And unless it affirmatively appears from the face of the complaint that the cause of action is barred by the applicable statute, limitation must be presented by special plea in defense. ...

But here, section 205(e) creates a new liability, one unknown to the common law and not finding its source elsewhere. It creates the right of action and fixes the time within which a suit for the enforcement of the right must be commenced. It is a statute of creation, and when the period fixed by its terms has run, the substantive right and the corresponding liability end. Not only is the remedy no longer available, but the right of action itself is extinguished. The commencement of

the action within the time is an indispensable condition of the liability. Cf. *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358; *Midstate Horticultural Co., Inc. vs. Pennsylvania R. Co.*, 320 U.S. 356, 64 S.Ct. 128 88 L.Ed. 96.

In *Callahan v. Chesapeake & O. Ry. Co.*, 40 F.Supp. 353, 354 (E.D. Ky. 1941), District Judge Mac Swinford stated:

"The rule is stated in the syllabus from *Morrison v. Baltimore & Ohio Railroad Company*, 40 App. D.C. 391, Ann. Cas. 1941C, page 1026, as follows: "Under the Federal Employers' Liability Act of June 11, 1906 (Fed. St. Ann. 1909 Supp. p. 585) the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right."

Johnson v. Railway Express Agency, *supra*, held that the timely filing of a charge with EEOC under Title VII of the Act did not toll Tennessee's applicable one-year statute of limitations. It would therefore appear to us to be utterly incongruous for us to hold that a federal statute which contains jurisdictional prerequisites for the exercise of its remedies is tolled by the mere filing of a grievance under a collective bargaining agreement.

Under Guy's contention the exercise of rights under Title VII could be delayed indefinitely for many years while an individual is pursuing other remedies. This contention conflicts with Congressional intent made manifest by the short

periods of time provided in the Act as prerequisites for the exercise of the rights.

Guy relies on the following decisions from other Circuits: *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Hutchings v. U.S. Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Malone v. North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Sanchez v. T.W.A.*, 499 F.2d 1107 (10th Cir. 1974).

It is noteworthy that all of these cases, except *Sanchez*, were decided prior to *Gardner-Denver* and hence are inapposite. *Sanchez* relies on these prior decisions. *Sanchez* conflicts with *Johnson v. Railway Express Agency, supra*.

In the brief of EEOC as amicus curiae a new issue is injected into the case which was not raised by plaintiff in the District Court, namely, that under the 1972 amendments to Title VII it had authority to assume jurisdiction retroactively to charges pending before the Commission. It relies on *Love v. Pullman Co.*, 404 U.S. 522 (1972).

Since this issue was not raised in the District Court by any party to the case, we are not required to consider it. *United States v. Summit Fid. & Sur. Co.*, 408 F.2d 46 (6th Cir. 1969); *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir.), cert. denied, 382 U.S. 812 (1965).

We do note, however, that in *Love, supra*, the charge had been timely filed with the Commission so that the jurisdictional prerequisite had been met.

Plaintiff Guy's claim was barred on January 24, 1972. She did not file her charge with EEOC until February 10, 1972. The amendments to Title VII, increasing the time within

which to file her charge to 180 days, did not become effective until March 24, 1972. 42 U.S.C. § 2000e-5(e). The subsequent increase of time to file the charge enacted by Congress, could not revive plaintiff's claim which had been previously barred and extinguished.

The judgment of the District Court is affirmed.

EDWARDS, Circuit Judge, DISSENTING. Appellant Guy was discharged for failure to report back to work on her production job with appellee Robins and Myers at the end of sick leave which had been granted to her. She claims that she notified appellee that she was not able to return on the day set, but when she did return four days later, she was informed she had been discharged.

Promptly on October 27, 1971, the union filed a grievance on her behalf, alleging that the discharge was illegal under the union-management contract. This grievance was denied at the third step on November 18, 1971. Thereafter plaintiff filed a charge, alleging that her discharge was racially motivated, before the Equal Employment Opportunity Commission. This charge was filed February 10, 1972, 108 days after her discharge. At the time the EEOC limitation provided for a 90-day period within which to file the charge. On March 24, 1972, however, Title VII was amended to increase the filing time to 180 days. See 42 U.S.C. § 2000e-5(d). EEOC, in an amicus brief filed in this appeal, asserts that the 1972 amendment should be read retrospectively as applicable to appellant's complaint, since it was pending in EEOC's possession at the time when the amendment became effective 151 days after plaintiff's discharge.

The EEOC position is that the amendment did not create

a new cause of action. It merely increased the period from 90 to 180 days before the limitation became effective.

In *Davis v. Valley Distributing Co.*, F.2d (9th Cir. 1975) (No. 73-2725, decided July 30, 1975), the court, per Browning, J., held that a similar 180-day extension amendment (applicable to filing before the EEOC) should be given retroactive effect. The court said.

The 1972 Act became effective March 24, 1972. The prior 90-day limitation had run on appellant's complaint some 54 days earlier. It is the general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred. *James v. Continental Insurance Co.*, 424 F.2d 1064, 1065-66 (3d Cir. 1970). But the question is one of legislative intent; and though not free from doubt, we think it the more likely conclusion that Congress intended the extended limitations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period.

Section 14 of the 1972 Act provides:

The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

Initially, both the House and Senate bills provided that the amendments to section 706 would *not* apply to charges filed prior to the effective date of the amendments. H.R. 1746, 92d Cong., 2d Sess. § 10 (1972); S. 2515, 92d Cong., 2d Sess. § 13 (1972). Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable

to pending claims. *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1355 (6th Cir. 1975); *Koger v. Ball*, 497 F.2d 702, 708 (4th Cir.) 1974). But Congress did not limit section 14 of the 1972 Act to the new remedy, although it would have been simple to do so. The language of section 14 is sweeping. It includes all amendments to section 706. Congress was, of course, aware of the other amendments to section 706 contained in the same bill. The provision extending the limitation periods was called to Congress' attention by committee reports and in floor debate. In both the House and Senate, prior court decisions maximizing coverage within the given time limits were noted with approval, and the remedial purpose of extending the 90-day period to 180 days was emphasized.

The words of section 14 affirmatively suggest an intention to encompass discriminatory conduct that occurred before the Act was passed "[C]harges pending with the Commission on the date of enactment of this Act" could only involve conduct occurring prior to that date. It might be contended that a charge filed with EEOC after the pre-amendment 90-day limitation had expired, as in this case, was not "pending" on the effective date of the Act. It is unnecessary to argue the point. Section 14 also makes the amendments applicable to "all charges filed thereafter." Since appellant's claim was not formally "filed" until EEOC assumed jurisdiction after the claim was returned by the Arizona Commission, it fell within the literal words of the statute.

There is no substantial reason for giving less than their full meaning to the words of section 14. Even as extended, the time limits under the statute are exceedingly short, particularly since, as Congress noted, most complaints are laymen representing themselves. The

Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of victims of discrimination. *EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187, 189 (9th Cir. 1974). Accordingly, "courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity, resolved them in favor of the complaining party." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970).

Davis v. Valley Distributing Co., *supra*, at —. (Footnotes omitted.)

This issue, as outlined above, was not presented to the District Court in our instant case, and in fairness to the District Judge, it should be.

I would remand this case for consideration of the effect of the 1972 EEOC amendments.

APPENDIX B

Nos. 74-2144 and 74-2145

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Filed December 9, 1975

DORTHA ALLEN GUY
and
INTERNATIONAL UNION OF ELECTRICAL
RADIO AND MACHINE WORKERS, AFL-
CIO LOCAL 790,
Plaintiffs-Appellants,

vs.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Defendant-Appellee.

ORDER

Before WEICK, EDWARDS and PECK, Circuit Judges

This cause came on to be heard upon the petition for rehearing with the suggestion that it be reheard en banc. No active Judge having requested that the petition be reheard en banc, the petition for rehearing was considered by the panel and was found to be not well taken.

It is therefore Ordered that the petition for rehearing be and it is hereby denied. Judge Edwards dissents.

ENTERED BY ORDER OF THE COURT.
John P. Heliman, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Filed May 30, 1974

DORTHA ALLEN GUY,

Plaintiff,

vs.

ROBBINS & MYERS, INC.

(HUNTER FAN DIVISION), et al.,

Defendants.

No. C-74-165

ORDER

This complaint against an employer and local union arises out of an alleged discriminatory termination from her job at Hunter Fan Division of Robbins & Myers, Inc., (herein referred to as R & M) on or about October 25, 1971. The suit is brought by a black female under 42 U.S.C. § 2000-e et seq. (as amended) and 42 U.S.C. § 1981; jurisdiction is asserted under the Equal Employment Act (42 U.S.C. § 2000(e)5(f)(3)) and 28 U.S.C. § 1343(4). She claims also that the Union failed to represent her because of her race. The complaint avers that on February 10, 1972, a charge was filed with the E.E.O.C. alleging a discriminatory discharge while plaintiff was purportedly on sick leave, and it further sets out a notice of right-to-sue by E.E.O.C. on or about November 20, 1973. This suit was filed on March 19, 1974.

Defendant R & M has filed a motion to dismiss on several

different grounds. First, we consider the motion with respect to 42 U.S.C. § 1981. Tennessee has a one year statute of limitations which has been held applicable to actions brought under 42 U.S.C. § 1981 and other sections of the Civil Rights Act of 1866.¹ This suit was filed nearly two and a half years after the alleged wrongful discharge and over two years after a charge was submitted to the E.E.O.C. The claim under 42 U.S.C. § 1981 is barred on its face by the Tennessee statute of limitations of one year. *Johnson v. R.E.A.*, 489 F.2d 525, 529 (6th Cir. 1973) reh. denied, (1974); *Snyder v. Swann*, 313 F.Supp. 1267 (E.D. Tenn. 1970). Title VII civil rights actions and actions under 42 U.S.C. § 1981 are independent. *Alexander v. Gardner-Denver Co.* — U.S. —, 42 L.W. 4214 (1974); *Johnson v. R.E.A.*, *supra*, p. 530. See *Long v. Ford Motor Co.*, — F.2d —, #73-1993 (6th Cir. 1974). Filing the charge with E.E.O.C. therefore did not toll the statute of limitations. *Johnson v. R.E.A.*, *supra*, pp. 529-531; *Jenkins v. Gen. Motors*, 354 F.Supp. 1040 (D. Del. 1973); *Young v. I.T.T.*, 438 F.2d 757 (3rd Cir. 1971).

Plaintiff argues, however, that to apply the Tennessee one year statute above cited (see footnote ¹) is unconstitutionally discriminatory because plaintiff's claim is in its nature contractual and should instead be subject, if at all,

¹ "Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after the cause of action accrued."

to a six year limitation set out in the case of breach of contract in T.C.A. § 28-309. Plaintiff relies upon *Republic Pictures v. Kappler*, 151 F.2d 543 (8th Cir. 1945), affirmed per curiam, 327 U.S. 727 (1946). That case, however, was based upon a Fair Labor Standards Act claim, 29 U.S.C. § 201 et seq., which, like 42 U.S.C. § 1981, contained no "built in" limitations period of its own. Iowa had adopted a special six months statute of limitations limited to actions brought under federal statutes. The Court observed:

"Here, the state has singled out federal claims or causes of action as such and has prescribed a shorter period of limitations for the bringing of such actions than that prescribed for the bringing of similar actions . . ." (p. 547)

Under these special circumstances, despite a strong dissent by Judge Sanborn, the state statute was held to be a 14th amendment denial of equal protection. The situation in the instant case is dissimilar. Tennessee's limitation is applicable generally to a number of tortious types of actions; has been on the books for many years; is a reasonable period of limitation (twice as long as the Iowa Statute); and is not directed against federal statute or civil rights plaintiffs discriminatorily. See *Swick v. Martin Co.*, 68 F.Supp. 863 (D. Md. 1946) affirmed 160 F.2d 483 (4th Cir. 1947) cert. denied 332 U.S. 772. Plaintiff is not being "cast out because [s]he is suing to enforce a federal act." *McKnett v. St. Louis & S. F. Railroad*, 292 U.S. 230 (1934) cited in *Koppler, supra*, p. 546, is accordingly inapposite here. Additionally, plaintiff's claim under the old civil rights act lies in tort, not in contract. *Johnson v. R.E.A. supra*, p. 529. Defendant R & M's motion to dismiss plain-

tiffs claim under 42 U.S.C. § 1981 and 28 U.S.C. § 1343(4) is therefore granted for the reasons stated.

The timetable in this case with respect to the 90 day period for filing suit in Title VII equal employment opportunity situations² is hereafter set out as stated by plaintiff:

1. On or about November 20, 1973, plaintiff received her right to sue letter;
2. Through February 18, 1974, plaintiff sought but did not find legal assistance;
3. February 19, 1974, plaintiff visited the United States District Court Clerk's office and presented her right to sue letter and asked for appointment of counsel;
4. The clerk of the court referred her to the Shelby County Legal Services office and told her that she could ask that office to represent her.

On February 19, 1974, if plaintiff received the E.E.O.C. notice or letter on or about November 21, 1973, approximately 90 days had already elapsed.

On February 20, 1974, plaintiff's attorney filed the right to sue letter and sought an extension of time in which to

² Equal Employment Opportunity Act of 1972, Sec. 706(f)(1) . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge.

file a lawsuit. Judge Robert M. McRae of this Court granted an extension of 30 days.

On February 21 to March 18, 1974, plaintiff's attorney sought to conciliate.

It may be that plaintiff has failed to comply with this time requirement which is held to be a jurisdictional prerequisite. *Goodman v. City Products Corp.*, 425 F.2d 702 (6th Cir. 1970); *Johnson v. R.E.A.*, *supra*. The filing of a right-to-sue letter does not, in and of itself, extend the limitations period. Cf. *Huston v. G.M.C.*, 477 F.2d 1003 (8th Cir. 1973); *Harris v. National Tea Co.*, 454 F.2d 307 (7th Cir. 1971). The action purportedly extending the time may not have been a jurisdictional act. *Kavanaugh v. Noble*, 332 U.S. 535 (1947); *Rosenman v. U.S.*, 323 U.S. 658 (1945). Equitable considerations come into play, however, if the Court, as alleged, attempted to grant the extension and if plaintiff and her counsel relied upon that action and did what is alleged in the complaint in seeking to preserve or protect her rights. Nothing has been submitted by defendant to controvert plaintiff's and her counsel's assertions in this respect. The motion to dismiss on this basis is overruled at this time based on the present state of the record on the authority of *Harris v. Walgreen's*, 456 F.2d 588 (6th Cir. 1972); *Harris v. National Tea*, 454 F.2d 307 (7th Cir. 1971); *Workman v. Ravenna Arsenal*, 6 FEP Cases 149 (N.D. Ohio, 1973).

It is not necessary that the Court consider plaintiff's further argument with respect to whether the 90 day E.E.O.C. limitation is tolled by reason of her filing a grievance discharge during this period. It is noted, however, that her grievance referred only to an "unfair action" of

defendant R & M and did not specify any racial animus or basis of this action. The rationale of *Alexander v. Gardner-Denver*, *supra*, might indicate that the union contractual grievance and the E.E.O.C. claims, being independent of each other, as in the case of the 42 U.S.C. §1981 claim, the processing or pursuing of such relief separately would not amount to a tolling of nor effect any extension of a limitation period. See *Johnson v. R.E.A.*, *supra*.

The Court dismisses plaintiff's 42 U.S.C. §1981 claim against R & M. The Title VII action is not dismissed and defendant's motion seeking such dismissal at this stage is overruled.

This 30th day of May, 1974.

/s/ HARRY W. WELLFORD
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Filed June 12, 1974

DORTHA ALLEN GUY,

Plaintiff,

vs.

ROBBINS & MYERS, INC.

(HUNTER FAN DIVISION), et al.,

Defendants.

No. C-74-165

MEMORANDUM OPINION AND ORDER

Defendant has renewed its motion to dismiss plaintiff's suit because of her failure to comply with 42 U.S.C. § 2000e-5(d) requiring the filing of a charge with Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred.¹ The relevant times and acts that took place in this case all occurred prior to March 24, 1972. The amendment extending the time for filing 42 U.S.C. § 2000e-5(e) was prospective in its application. From the pleadings and memorandum filed on plaintiff's behalf, it is clear that she was to report back to work on October 24, 1971, when her sick leave expired. On October 29, 1971, when she returned to work, she found that she had been terminated on October 25, 1971, as having voluntarily quit, a status she contested by filing a union grievance on October 27, 1971. She filed a charge against her

¹ This provision in the 1964 Civil Rights Act dealing with employment discrimination was amended March 24, 1972, by the 1972 Civil Rights Act. (42 U.S.C. § 2000e-5(e)).

employer with E.E.O.C. on February 10, 1972, asserting that the Company's action was unfair. (She did not describe it as discriminatory).

"It is true that the statute requires the person aggrieved to file a written charge within 90 days; it says so clearly and the courts so hold." *Fore v. Southern Bell Tel. Co.*, 293 F.Supp. 587, 588 (W.D. N.C. 1968). See also *McCarty v. Boeing Co.*, 321 F.Supp. 260 (W.D. Wash. 1970); *Younger v. Glamorgan Pipe Co.*, 310 F.Supp. 195 (W.D. Va. 1969); *Gordon v. Baker Prot. Services*, 358 F.Supp. 867 (N.D. Ill. 1973); and *Heard v. Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

"It may be conceded that a typical lay-off, without more, is not a continuing event, but is a completed act at the time it occurs, so that a charge alleging a discriminatory lay-off must ordinarily be filed within 90 days thereafter." *Sciara v. Oxford Paper Co.*, 310 F.Supp. 891 (D. Me. 1970). From the complaint itself the alleged discriminatory discharge and refusal to reinstate took place in October, 1971, more than 90 days prior to the charge with the E.E.O.C. on February 10, 1972. Unless the act complained about were continuous in its nature, re-occurred after October, 1971, or unless the period were somehow tolled, plaintiff is barred because of her failure to comply with statutory jurisdictional requisites. *Choate v. Caterpillar Tractor*, 402 F.2d 357 (7th Cir. 1968); *Mickel v. S. C. State Emp. Service*, 377 F.2d 239 (4th Cir. 1967); *Sanchez v. Standard Brands*, 431 F.2d 455 (5th Cir. 1970).

Senator Everett Dirksen on June 5, 1964, in explanation of changes made by the Senate in the House bill, with particular reference to Section 706(d):

'New Subsection (d) requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in Subsection (b), he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. The additional 120 days is to allow him to pursue his remedy by State or local proceedings.' 11 Cong. Rec. 12297. *Banks v. Local Union #136*, 296 F.Supp. 1190 (1968)

Tennessee does not have a civil rights law or did not during 1971 and 1972.

Plaintiff contends, on the authority of *Culpepper v. Reynolds Metals*, 421 F.2d 888 (5th Cir. 1970), that the 90 day period is tolled because she filed a grievance directed toward the defendant company within that period.² See *Hutchings v. U. S. Industries*, 428 F.2d 303, 309, (5th Cir. 1970); *Malone v. North American Rockwell Corp.* 457 F.2d 779, 781 (9th Cir. 1972); *Moore v. Sunbeam Corp.*, 459 F.2d 811, 826 (7th Cir. 1972). These cases, however, are based on the rationale that plaintiff should be encouraged first to try the grievance procedures before resorting to the E.E.O.C. and that the acts are interrelated in respect to disputes over discrimination. *Dewey v. Reynolds Metals*, 429 F.2d 324 (6th Cir. 1970) affirmed by a divided Supreme Court, 402 U.S. 689 (1971). *Dewey* and its progeny held that pursuing a contractual grievance remedy to its conclusion might estop later pursuit by a claimant of E.E.O.C. pro-

² She also complains that the defendant union failed to represent her fairly and diligently.

cedures and suit; that the remedies were related and interconnected. *Culpepper, supra*, held, however, that utilization of grievance procedure did not estop, preclude, or constitute an election of remedies insofar as a grievant was concerned who might later claim violation of the 1964 Civil Rights Act equal employment provisions.

In 1974, however, the Supreme Court unanimously in *Alexander v. Gardner-Denver Co.*, U.S., 42 L.W. 4214 (2-19-74) disavowed the *Dewey v. Reynolds Metals, supra*, rationale. At page 10 of the slip opinion, the Court acknowledges that "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." (Emphasis ours.) The Court goes on to hold that grievance-arbitration procedures neither foreclose nor preclude an individual's E.E.O.C. rights and requirements, nor divest the court of jurisdiction to decide equal employment discretion questions that may arise under the Act. In other words, "Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under Title VII" and other statutes or private contract remedies, even though these rights have a "distinctly separate nature." (pp. 11, 13 slip opinion, *Alexander v. Gardner-Denver, supra*). In another place, pp. 14, 15, Justice Powell, speaking for a unanimous court says "Title VII strictures are absolute" and "are not susceptible to prospective waiver."

Since rights under Title VII are and under the contract between the parties "have legally independent origins and are equally available," it appears that both should proceed independently and in accordance with their own statutory or contractual limitations and requirements. The rationale of *Alexander v. Gardner-Denver Co., supra.*, persuades this Court that the 90 day Title VII requirement for filing a claim with the E.E.O.C. after the occurrence of the alleged discriminatory event is not effected or abated or tolled by an independent grievance-arbitration proceeding under a contract. The E.E.O.C., after all, is required by the statute in question to attempt reconciliation and negotiation of the differences before further action is taken. Thus, grievance and conciliation procedures independently would work for a settlement and disposition of the disputes between employer and employee. Whether or not an employee files a grievance, or files an E.E.O.C. charge, he or she still has a separate right to claim 42 U.S.C. § 1981 (1866 Civil Rights Act) violations. *Long v. Ford Motor Co.,* F.2d (6th Cir. 4-30-74). That employee, however, must abide by applicable statute of limitations requirements as to a Section 1981 claim, just as he or she must abide with contractual or 42 U.S.C. § 2000e-5(e) prerequisites.

Since plaintiffs did not file her claim with the E.E.O.C. within 90 days after her alleged discriminatory discharge, defendant employer's motion to dismiss to the 1964 Civil Rights, Title VII, claim is granted.

This 12th day of June, 1974.

/s/ HARRY W. WELLFORD

United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Filed June 19, 1974

DORTHA ALLEN GUY,

Plaintiff,

vs.

ROBBINS & MYERS, INC.

(HUNTER FAN DIVISION), et al.,

Defendants.

No. C-74-165

ORDER ON RECONSIDERATION

The Court on May 30, 1974, entered an order in this case dismissing plaintiff's alleged cause of action under 42 U.S.C. § 1981 and overruling defendant's motion on the question as to whether the filing of her complaint came within the 90 day period after issuance of the right-to-sue letter. (In effect, because it involved a possible factual dispute, it was held to be appropriate to reserve a ruling for a hearing on the merits.) Without then expressly so ruling, the Court indicated that the recent Supreme Court decision of *Alexander v. Gardner-Denver Co.,* U.S., 94 S.Ct. 1011, 42 L.W. 4214, 1974) "might indicate that the Union contractual grievance and the E.E.O.C. claim, being independent of each other, . . . would not amount to a tolling of nor effect any extension of a [90 day] limitation period. See *Johnson v. R.E.A.,* 489 F.2d 525, 529 (6th Cir. 1973) *reh. denied*, (1974) petition for certiorari applied for."

Plaintiff moved to amend her complaint, and defendant

Robbins & Myers moved the Court to reconsider and formally rule on its motion to dismiss alleging plaintiff's failure to file her charge with E.E.O.C. within 90 days of the happening of the alleged discriminatory act on defendant Robbins & Myers' motion to dismiss and sustaining it on the failure of plaintiff to file a claim with E.E.O.C. within the statutory period. (See the memorandum opinion and order dated June 12, 1974.) Plaintiff has moved that the Court reconsider this opinion, especially in light of *Schiff v. Mead Corp.*, 3 EPD#8043 (6th Cir. 1970), unreported. The Court was aware of this decision, however, when it rendered its opinion adverse to plaintiff's contentions. The primary factor involved there was a change of position on the part of E.E.O.C., which influenced the Court¹ to decide that the filing of a contractual grievance might toll the 90 day statutory period described in 42 U.S.C. § 2000e-5(d).² The *Schiff v. Mead Corp.* case, however, was decided at a time that *Dewey v. Reynolds Metals*, 429 F.2d 324 (6th Cir. 1970) affirmed by an equally divided Supreme Court, was considered the law in this Circuit. The *Dewey* rationale was overruled in *Alexander v. Gardner-Denver Co.*, *supra*. It was there emphasized that the E.E.O.C. claims and procedures were separate and independent and that action or conduct taken in behalf of one such claim had no preclusive effect on the other. *Johnson v. R.E.A.*, *supra*, had held that filing of an E.E.O.C. charge did not toll the statute of limitations on a 42 U.S.C. § 1981 civil rights action. *Long v. Ford Motor Co.*, #73-1993, F.2d (6th Cir., 4-30-74) held that 42 U.S.C. § 2000e (Title VII) actions and 42 U.S.C. § 1981 are independent of one

¹ (U.S.D.C. N.D., Ohio)

² Now amended by the 1972 Equal Employment Opportunity Act.

another, and, as we construe it, that the District Court³ was correct in holding that the Title VII statutory time requirements for filing a charge were not tolled by the filing of a suit under the 1866 Civil Rights Act. On the other hand, the District Court's findings for the claimant under the latter statute were to be rescinded on remand in light of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

On the face of the Title VII statute, the only means of tolling the 90 day period for filing an E.E.O.C. charge after the alleged discriminatory event was (and is) a filing of a charge with equal employment opportunities and discrimination. This plaintiff Guy could not do so, because Tennessee nor Shelby County has any such agency or law authorizing such a body.

After the discharge in question, Guy had a legal right to file a grievance against her employer under the Union contract, provided she adhered to its terms. Whether or not she filed her grievance, plaintiff also had a right within 90 days to file a charge of racial discrimination. Within a year, whether or not she pursued contractual or E.E.O.C. procedures, she had a right to file suit for alleged discrimination under 42 U.S.C. § 1981. Plaintiff failed to follow through with either of the latter two statutory rights in accordance with applicable time requirements. Defendant's motion to dismiss is proper under these circumstances.

It should be noted that plaintiff did in fact pursue her grievance through three levels unsuccessfully.⁴ Furthermore, E.E.O.C. investigated her claim and determined on

³ (U.S.D.C. E.D., Mich.)

⁴ See the findings and conclusions of E.E.O.C. filed as a part of the record in this cause.

November 20, 1973, that "the Commission finds no reason to believe that race was a factor in the decision to discharge . . ." Plaintiff waited until the last day of the 90 days given her, or until the ninetieth day in which to seek the Court's assistance in filing her Title VII suite after having received an adverse determination to her claims since October of 1971. This lack of diligence, in and of itself, might not constitute a bar, *Harris v. Walgreen's Dist. Center*, 456 F.2d 588 (6th Cir. 1972), but is indicative of plaintiff's dilatory role in these proceedings throughout. See *Fekete v. U.S. Steel*, 424 F.2d 331 (3rd Cir. 1970) as to the effect of a negative E.E.O.C. determination involving "possibilities of sophisticated discrimination . . . because of European ancestral origin" after an arbitrator's reinstatement of claimant with back pay—an entirely different situation from that at bar. Compare *Beverly v. Lone Star Lead*, 437 F.2d 1136 (5th Cir. 1971) dealing with this question where plaintiff filed his claim with E.E.O.C. a week after the alleged discriminatory event, and within approximately 20 days after an adverse E.E.O.C. determination, filed his suit in federal court.

Mrs. Guy was not "penalized" for her seeking "to adjust her dispute with her employer through the private machinery of the grievance procedure" as described in *Malone v. N. American Rockwell*, 457 F.2d 779 (9th Cir. 1972). That case did not decide whether there had been a continuing act of discrimination for failure to promote, or whether the settlement of a grievance was in itself a discriminatory act with respect to whether claimant had delayed too long in filing a claim with E.E.O.C. after intervening investigation by a state employment opportunities commission. This Court has granted the motion to dismiss upon reconsidera-

tion, because plaintiff, a Union steward, did not comply with Title VII statutory time requirements of filing her E.E.O.C. charge after her termination.

Plaintiff's claims against the employer, Robbins & Myers, must stand dismissed.

/s/ HARRY W. WELLFORD

United States District Court Judge

Date:

APPENDIX D**SECTION 706(d) OF THE CIVIL RIGHTS ACT OF 1964, 78 STAT. 259 (JULY 2, 1964):**

“(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practices occurred. Except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.”

SECTION 706(e) OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, P.B.L. 92-261, 86 STAT. 103, 104 (MARCH 24, 1972) 42 U.S.C. § 2000E-5(E)):

“(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on

behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.”

SECTION 14 OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, PUB. L. 92-261, 86 STAT. 103, 113 (MARCH 24, 1972):

“(14) The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and to all changes filed thereafter.”